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No. 95-1069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HOFFMAN CONTROLS CORPORATION,
Petitioner,

v.

BURGESS-SAIA, INC. and LANDIS & GYR, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT LANDIS & GYR, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.1

This brief is filed on behalf of Landis & Gyr, Inc., whose parent company is Landis & Gyr AG, and who has no subsidiaries (excluding wholly-owned subsidiaries).

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STATEMENT OF THE CASE

Petitioner Hoffman Controls Corporation ("Petitioner") is a Dallas, Texas, company which designs and manufactures mechanical controls for heating and air conditioning units. From 1983 until March 23, 1987, the Industrial Components Division of Respondent Landis & Gyr, Inc. ("L&G"), then a wholly-owned subsidiary of Landis & Gyr AG, a Swiss corporation, was the United States distributor of motor gearbox assemblies manufactured in Switzerland by L&G's sister subsidiary SAIA AG, which was also a Swiss corporation. In December

1986, Landis & Gyr AG sold SAIA AG to an English company, SAIA, Inc.; on March 23, 1987, L&G in turn sold its Industrial Components Division to SAIA, Inc., pursuant to an "Asset Sale Agreement Dated As Of March 23, 1987, between Landis & Gyr, Inc. and SAIA Inc." In 1989, SAIA, Inc., merged with a British company, British Holdings PLC, to form respondent Burgess-SAIA, Inc. ("Burgess"). (L&G Motion for Summary Judgment, Exs. A-D, Tr. Vol. 2, pp. 405-437.)

Beginning in 1983 and continuing throughout the 1980's, Petitioner purchased from L&G—and later from Burgess—two models (Ba and F) of motor gearbox assemblies, specially modified at Petitioner's order, to be used in Petitioner's mechanical controls. Neither L&G nor Burgess ever sold any other products to Petitioner.

On July 18, 1991, Petitioner filed suit against Burgess in the 44th Judicial District Court of Dallas County, Texas, alleging breach of contract and warranty with respect to the motor gearboxes. (Plaintiff's Original [state court] Petition, ¶ 4-8, Tr. Vol. 1, p. 70.) Specifically, Petitioner complained that the gearboxes did not comply with the specifications of Petitioner's original September 20, 1983, purchase order for the Ba and F gearboxes. (Purchase Order, Tr. Vol. 5, p. 51.) Following Texas procedure, Burgess entered general and specific denials of Petitioner's complaint allegations and, in addition, filed a sworn counterclaim for $10,025 owed on an unpaid invoice for motor gearboxes delivered in December 1990. (Counterclaim, Tr. Vol. 1, pp. 82-88.) Petitioner failed to file a sworn denial to Burgess' counterclaim. It did file an unsworn answer, incorporating by reference as its affirmative defenses to the counterclaim the allegations of its underlying complaint. (Plaintiff's Original

Answer, Tr. Vol. 1, pp. 89-91.) Petitioner's state court action was called to trial on October 1, 1992. After the court denied its request for a continuance of the trial, Petitioner took a nonsuit.

Burgess, however, did not dismiss its counterclaim on October 1, 1992, and the Texas court entered judgment on the pleadings in Burgess' favor, finding that Burgess had proved an open account under Texas Rule of Civil Procedure 185; that Petitioner had not timely filed a sworn written denial of the sworn account and could therefore offer no evidence as to any defense or affirmative defense; and that Burgess' counterclaim was actually litigated and finally adjudicated on the pleadings. (Pet. Appendices A-5-1 *et seq.* and A-6-1 *et seq.*)

Petitioner appealed the state court judgment. The judgment was ultimately affirmed.[1] Meanwhile, on October 19, 1992, while the state court appeal was pending, Petitioner filed this action in the United States District Court for the Northern District of Texas. (Plaintiff's Original Complaint, Tr. Vol. 1, pp. 1-20.) In its federal court suit, Petitioner, who this time sued L&G and SAIA, Inc.[2] as well as Burgess, again alleged defects in the motor gearboxes it had purchased from L&G and Burgess.[3] Contrary to Petitioner's implication (Pet. at 4),

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[1] *Hoffman Controls Corp. v. Burgess-SAIA, Inc.*, 1994 WL 60873 (Tex. App. - Dallas).

[2] Petitioner never served SAIA, Inc. with summons and complaint.

[3] Petitioner claims (Pet. at 3) that it only learned the "cause" of the alleged failures of the Ba gearboxes in October 1990 when its engineer performed life tests on the units. In fact,

(continued...)

L&G in its initial answer and thereafter repeatedly denied that it had misrepresented or otherwise acted wrongfully with respect to the special-order product it distributed for Petitioner's testing, approval and eventual purchase in production quantities.

Asserting that Petitioner's federal court claims were barred by the *res judicata* effect of the state court judgment, Burgess moved for a conditional summary judgment and stay of proceedings pending the state court appeal. On August 2, 1993, the district court granted the requested stay, on the ground that *res judicata* would bar Petitioner's entire federal court action if the state court judgment were affirmed on appeal. (Memorandum Opinion and Order, Tr. Vol. 1, pp. 202-209.)

Petitioner appealed the district court's stay order, and on April 15, 1994, the Fifth Circuit Court of Appeals reversed, instructing the district court to

> . . . [m]ore carefully and specifically examine how—if at all—transactions spanning over many years and involving different series of gearbox assemblies are so related as to constitute the same transaction for *res judicata* purposes.

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[3] (...continued)
Petitioner's representatives testified that the gearboxes had been repeatedly tested: in 1983, samples were tested; in 1984, the special-order gearboxes were distributed for field tests; in 1985, stall tests were run on the gearboxes; every product received was tested; tests on both models of gearboxes went on "continuously"; and all returns were analyzed for malfunction. (Burgess' Motion for Summary Judgment, Undisputed Facts, ¶¶ 14, 17, and 18, Tr. Vol. 5, p. 6; Byrnes Dep., Tr. Vol. 3, pp. 559-62; Bowman Dep., Tr. Vol. 3, pp. 564-66; Byrnes Affidavit, ¶ 13, Tr. Vol. 7, p. 113; Bowman Affidavit, ¶ 11, Tr. Vol. 7, p. 107.)

(Fifth Circuit Judgment and Memorandum Opinion and Order, Tr. Vol. 2, p. 304.)

In response to the Fifth Circuit's concerns, on June 30, 1994, Burgess filed a second motion for summary judgment based on *res judicata*, which provided even more factual proof of the nature of the parties' transaction. On July 1, 1994, L&G filed its own motion for summary judgment asserting the *res judicata* effect of the judgment entered in favor of its privy, Burgess.[4] In its response to L&G's motion for summary judgment, Petitioner did not contest the fact or effect of the privity of contract and successor relationship between Burgess and L&G. (Tr. Vol. 7, pp. 1-116.) Petitioner did not list any disputed facts or issues of law relating to privity, although Federal Local Court Rule 5.2(a) for the U.S. District Court of Texas requires in pertinent part:

> The responses to a motion for summary judgment shall list in numerical order (i) the disputed facts upon which the response relies and (ii) the issues of law.

Further, prior to July 1, 1994, when Petitioner filed its second amended complaint, which alleged that Respondents had breached their contract and warranties by selling allegedly defective Ba, but *not* defective F, gearboxes, all of Petitioner's complaints claimed defects generally in all gearboxes provided and asserted breach of the original September 20, 1983, purchase order for both special

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[4] Simultaneously, L&G filed a motion for summary judgment on all counts based on the applicable statutes of limitation, and Burgess filed a motion for partial summary judgment based on the statutes of limitations. The district court opinion of November 9, 1994 (Pet. Appendix at A-4-8), incorrectly states that L&G's motion was for partial summary judgment.

order models. It was only after the district court's first determination that Petitioner's federal action was barred by *res judicata* that Petitioner began to assert that only the Ba gearboxes had failed.[5]

On November 9, 1994, the district court granted both Burgess' and L&G's motions for summary judgment, specially addressing the concerns of the Fifth Circuit and finding that the dealings between Hoffman, Burgess, and L&G constituted a single transaction for *res judicata* purposes. In its opinion, the district court, noting that Petitioner "does not contest [L&G's] claim of privity," nevertheless examined the record and affirmatively found that L&G and Burgess were in privity for *res judicata* purposes because Burgess adequately represented its predecessor's interests in connection with the state court litigation. (Pet. Appendix at A-4-8.) The district court thus entered final judgment in favor of both Burgess and L&G.

Petitioner again appealed.

As to its failure to contest any fact or advance any argument as to the existence or legal effect of L&G's and Burgess' privity, Petitioner belatedly made new arguments—both procedural and substantive—to the Fifth Circuit. First, Petitioner argued that *res judicata* could

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[5] Petitioner's new-found assertion flew in the face of its own prior state court affirmative defense to Burgess' counterclaim, in which Petitioner pled that it did not owe Burgess the $10,025 because the invoiced product—F gearboxes only—was defective. Petitioner's argument was also controverted by the testimony of its own president, who at deposition admitted that his company had sued for damages relating to the F, as well as the Ba, gearboxes because it feared the F model would imminently "fail" too. (Tr. Vol. 3, p. 586.)

never be invoked by L&G because L&G was not a party to the state court suit and had no standing to plead *res judicata*. Second, and only in its reply brief, Petitioner argued that L&G's uncontroverted and uncontrovertible factual proof of its asset sale to Burgess' predecessor and merger partner did not amount to a "material" fact relating to privity and therefore Petitioner was not obliged under Rule 56 to respond to it.

The Fifth Circuit affirmed. It held that because Petitioner had not raised the privity issue in the court below, it had waived it on appeal. Noting that privity is plainly material to L&G's entitlement to raise the *res judicata* effect of Burgess' judgment, the court summarily dispensed with plaintiff's Rule 56-based argument.

Petitioner's present Petition to this Court followed.

SUMMARY OF THE ARGUMENT

Petitioner, who evidently attacks only that portion of the Fifth Circuit's opinion that relates to affirmance of summary judgment for L&G, demonstrates no basis upon which this Court's certiorari jurisdiction may be invoked. Rule 10 of the Rules of the Supreme Court of the United States sets forth the bases for a grant of certiorari. First, such discretionary review is available to resolve a conflict among the federal courts of appeals and the state courts. This is "[a] principal purpose for which [the Court] use[s] [its] certiorari jurisdiction . . . ." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Second, a petition for certiorari may be granted where there are "special and important" policy reasons for the Court to decide an unsettled question of federal law. "But this Court does not sit to satisfy a scholarly interest . . . . [or] for the benefit of the par-

ticular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Third, certiorari may be granted where the appellate court has decided a federal question that conflicts with this Court's established decisions.

Petitioner here cannot and does not claim that a conflict or an important policy issue exists with respect to this case. Petitioner's contention, that the Fifth Circuit deviated from established law by deeming Petitioner to have waived any argument as to privity between L&G and Burgess, is simply wrong. Numerous Fifth Circuit cases over at least the past several decades have stated and applied the waiver rule. The Fifth Circuit's affirmance of summary judgment for L&G also fully comports with the law relating both to Rule 56 procedure and to the nature of the privity that entitles a non-party to invoke the *res judicata* effect of a judgment entered as to its privy.

ARGUMENT

I. BECAUSE THE FIFTH CIRCUIT'S DECISION FULLY COMPORTS WITH ESTABLISHED LAW, PETITIONER DEMONSTRATES NO BASIS FOR CERTIORARI IN THIS CASE.

Petitioner's apparent Rule 10 basis for certiorari is its claim that the Fifth Circuit improperly held that Petitioner waived its right to raise the privity issue. (Pet. at 6.) As noted above, the Fifth Circuit has repeatedly stated and applied the rule that an issue not raised below is not preserved for appeal. The waiver rule encompasses both factual evidence and legal theories and has been applied in the context of summary judgment motions. *See, e.g., Haubold v. Intermedics, Inc.*, 11 F.3d

1333, 1336 (5th Cir. 1994) (factual arguments of employees seeking severance pay were waived where they were not raised in response to employer's motion for summary judgment); *McLean v. International Harvester Co.*, 902 F.2d 372, 374 (5th Cir. 1990) (appellate court could not consider plaintiff's claim for indemnification for suit expenses where issue had not been raised in district court); *C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir. 1988) (defendant who had not disputed plaintiff's summary judgment affidavits in the district court could not, for the first time, dispute the physical placing of plaintiff's mechanic's lien on appeal); *Gabel v. Lynaugh*, 835 F.2d 124, 125 (5th Cir. 1988) (*pro se* appellant's claims not presented to district court would not be considered on appeal: "we are a court of errors and appeals; and the trial court cannot have erred as to matters which were not presented to it"); *Vaughner v. Pulito*, 804 F.2d 873, 878 n.2 (5th Cir. 1986) (appellate court would not consider plaintiff's Unfair Trade Practices and Consumer Protection Act claim where claim was not asserted in response to defendant's summary judgment motion; "[i]f a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived . . . .").

Attempting to avoid the consequences of its inaction in the district court, Petitioner, all the while admitting that L&G proved the fact of its contractual relation and privity with Burgess (Pet. at 14), argues here and argued before the Fifth Circuit that L&G did not meet its Rule 56 burden of establishing no question of material fact as to privity. Accordingly, Petitioner's argument goes, it, as nonmovant, did not have even to address L&G's contentions on privity.

Petitioner is incorrect on two bases. First, the case law is clear that to preserve its rights to appeal an issue, a party faced with a motion for summary judgment must respond with controverting evidence and/or arguments setting forth its legal theories. In *Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992), the court set forth the procedure to be followed. Once the movant identifies the portions of the record which highlight the absence of any factual issues, "the nonmovant must then direct the court's attention to evidence . . . to establish . . . a genuine issue of material fact . . . ." *Id.* at 1131. A party may not remain silent and then on appeal "advance new theories or raise new issues to secure reversal." *Id.* at 1132 n.10. *See also Dahlberg*, 836 F.2d at 919 (finding that because appellee had not submitted any affidavit, discovery, or even pleadings to controvert the facts established by the movant, appellee had not raised any genuine issues of material fact). Plainly, even if the nonmovant contests only the legal effect or legal theory relating to an uncontroverted fact, it must so advise the district court.

Further, even though Petitioner failed to contest the fact or effect of L&G's privity with Burgess, the district court below, like the district court in *Dahlberg*, properly examined L&G's evidence, and found that the record established that privity to satisfy *res judicata* standards existed between L&G and Burgess:

> Because Landis & Gyr Industrial Control Division was sold to SAIA, Inc. under an Asset Purchase Agreement, and SAIA, Inc. merged with Burgess Holdings PLC to form Burgess-SAIA, Inc., Landis & Gyr's interests were adequately represented by Burgess.

(Pet. Appendix at A-4-8.) The district court thus affirmatively found that L&G had met its burden under Rule 56. Petitioner's argument that L&G did not establish all the elements of its case is disproved by the record as well as by the district court's specific determination. It is also noteworthy that, contrary to Petitioner's assertions in this Court (Pet. at 4, 5, 11), Petitioner did not argue in the district court that L&G had failed to meet its Rule 56 burden to establish the elements of privity sufficient to invoke *res judicata*. (Response to Landis & Gyr's Motion for Summary Judgment, Tr. Vol. 7, pp. 1-116.)

Petitioner's cases (Pet. at 6-7) do not establish any basis on which the district court's review of the summary judgment evidence was insufficient under Rule 56. Petitioner's citations in fact support the procedure followed by the court below. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("[T]he motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied"); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 160 (1970) (where movant's affidavits establish a fact, to avoid conceding it, nonmovant must come forward with a contrary affidavit or an affidavit explaining why she cannot); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) ("We resolve factual controversies in favor of the non-moving party, but only when . . . both parties have submitted evidence of contradictory facts. *We do not, . . . in the absence of any proof, assume that the non-moving party could or would prove the necessary facts*" (emphasis the court's)); *Russ v. International Paper Co.*, 943 F.2d 589, 592 (5th Cir. 1991), *cert. denied*, 503 U.S. 987 (1992) (where defendant pointed to two dispositive issues estab-

lished in the record, it was incumbent on nonmovant to designate "specific facts" demonstrating a triable issue); *Montgomery v. Boshears*, 698 F.2d 739, 742 (5th Cir. 1983) (although plaintiff was not required to—and did not—contradict the summary judgment proof, summary judgment for defendant was affirmed where defendant's proof revealed both an absence of any disputed fact issue and defendant's entitlement to judgment as a matter of law); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981) (when the movant has proffered sufficient evidence, the nonmovant "must then come forward with specific offers of evidence to present a material fact dispute").

The history of this case is not similar to that in *John v. State of La. (Bd.)*, 757 F.2d 698 (5th Cir. 1985), and *Hibernia Nat'l Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277 (5th Cir. 1985), where the district court granted summary judgment simply because the nonmovant failed to file or delayed in filing its response. Nor did L&G provide the district court here with mere conclusions and no facts, as was the situation in *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135 (5th Cir. 1973). These cases are plainly inapposite.

In this court, Petitioner advances yet another theory, one not urged even before the Fifth Circuit; that is, that although L&G and Burgess are in privity, it is the wrong kind of privity. (Pet. at 14-15.) For the reasons stated in Section II below, Petitioner's latest theory lacks merit, just as its prior tardy arguments do. The Court need not, however, even address Petitioner's newest argument. "[O]rdinarily [the Court] will not decide questions not raised or litigated in the lower courts." *City of Spring-*

field, Mass. v. Kibbe, 480 U.S. 257, 259 (1987) (certiorari on the issue of a municipality's employee training improvidently granted where petitioner had not objected to pertinent jury instruction in § 1983 trial against city and police). *See also Ellis v. Dixon*, 349 U.S. 458 (1955) (where the question of vagueness of school board's school property regulations had not been raised in the state court below, it was not open for consideration on certiorari).

Application of the waiver rule is particularly appropriate here, since this Court ordinarily accepts and does not review a district court's application of the Federal Rules of Civil Procedure when affirmed by a court of appeals. *See Appalachian Power Co. v. American Inst. of C.P.A.*, 80 S.Ct. 16 (1959) (petitioner's contentions as to Rule 56 did not suffice to support certiorari). Similarly, petitioner's "wrong privity" contention here, not raised below (as it should have been to comply with Rule 56) has been waived and need not be addressed.

II. THE COURT BELOW PROPERLY DETERMINED THAT BECAUSE L&G WAS IN PRIVITY WITH BURGESS, PETITIONER'S FEDERAL ACTION AGAINST L&G, LIKE ITS ACTION AGAINST BURGESS, IS BARRED BY THE DOCTRINE OF *RES JUDICATA*.

Petitioner apparently does not seek to appeal to this Court either the Fifth Circuit's application of Texas state law as to a *res judicata* transaction or the affirmance of summary judgment in favor of Burgess. Even if Petitioner had not waived it and could properly raise the issue of the legal effect of L&G's privity with Burgess, Petitioner could demonstrate no error by the courts below, much

less any issue as to which this Court could appropriately grant certiorari under its rules and practice.

Petitioner both misstates and misunderstands the nature of *res judicata* privity. Ignoring long-established Fifth Circuit law on the subject, Petitioner claims that a predecessor in interest is not for *res judicata* purposes in privity with a successor in interest. (Pet. at 15.) The true rule was, however, enunciated by the court in *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977), which Petitioner cites with evident approval. (Pet. at 15.) The court there held that defendant airlines were bound by a judgment in prior litigation by the City of Dallas, because the city adequately represented defendants' only legal interest in the issues. Acknowledging the principle that "judgments can bind persons not party to the litigation in question," the court defined *res judicata* privity:

> "[P]rivity" denotes a legal conclusion rather than a judgmental process . . . . [I]t represents the legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion.

Id. at 95 (quoting in part Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964)). Relationships which meet the standard, the court went on, include 1) that between a non-party successor to an interest in property and his predecessor, a party to a judgment; 2) that between a non-party who controlled the original suit and a party to it; and 3) that between a non-party and a party who adequately represented the non-party's interests in the original suit. *Id.*

It was this third category of privity that L&G demonstrated and the district court found. As a defense to Burgess' counterclaim, Petitioner alleged contractual breaches and misconduct from 1983 on by both L&G *and* Burgess. Burgess, bound by and related to L&G by the Asset Sale Agreement, adequately represented L&G's interest by litigating (to the extent necessary) Petitioner's court claims and defenses. It is axiomatic that *res judicata* bars all claims and defenses which were actually litigated or which could with diligence have been litigated in the prior action. *Baudoin v. Bank of Lafayette*, 981 F.2d 736, 743 (5th Cir. 1993).

As Petitioner's own cited cases demonstrate, Fifth Circuit law on *res judicata* privity has not changed since *Southwest Airlines*. *See, e.g., Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir. 1990) (stating the rule that where one could and should have brought a claim in prior litigation, it is barred in a subsequent suit); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) ("Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties [in] a subsequent suit raising identical issues.")

Ignoring the controlling federal precedent and the Fifth Circuit's definitions of privity, Petitioner offers as the sole support for its wrong-kind-of-privity argument an 18-year-old Ohio state court case, *Litton ABS v. Red-Yellow Cab Co.*, 411 N.E.2d 808 (Ohio Ct. App. 1978), in which the court did not rely upon or apply the current and relevant definition of *res judicata* privity. *Litton* can have no application in this case.

CONCLUSION

Because Petitioner did not contest the fact or legal effect of the privity of contract between L&G and Burgess before the district court, the appellate court correctly held that issue waived. L&G fully complied with its obligations under Rule 56 to establish the absence of an issue of material fact and its entitlement to judgment as a matter of law, and the district court properly found that L&G had met its burden and established its right to the bar of *res judicata*. Substantively, the record fully demonstrates that because Burgess represented L&G's interests in the original state court suit, it and L&G were in privity for *res judicata* purposes. For these and all the other foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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